174 (3)

No. 09-1470

IN THE

Supreme Court of the United States

JAMES L. CHEESEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition misunderstands the purpose for which a statutory maximum fine may be "relevant" under *United States v. Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, it was relevant to aid the Court in assessing a defendant's individual culpability. In Respondent's view, however, it can be relevant as a separate "factor" that *disregards*, and can be weighed against, a defendant's individual culpability. (Br. in Opp. at 8.) This critical misunderstanding is the basis of the lower court's error and of the split among the Circuit courts.

I. The statutory maximum was not among the factors the Court considered in *Bajakajian*.

Outside of a single footnote, *Bajakajian* did not discuss the defendant's statutory maximum *at all*, let alone consider it as a factor in its gross-disproportionality analysis as Respondent claims. Its analysis looked instead to (1) the type of offense, (2) the offense's relationship to other illegal activities, (3) whether the defendant fits into the class of persons for whom the statute was intended, (4) the maximum Guidelines fine, and (5) the harm caused. *Bajakajian*, 524 U.S. at 338-39.

The Court only mentioned the statutory maximum in a footnote, and then only to respond to the dissent's view that the Court should defer "to the congressional judgment of what is constitutional" (i.e., to the statutory maximum) rather than look to the Guidelines. *Id.* at 339 n.14; id. at 350-51 (Kennedy, J., dissenting). The Court then identified two ways in which the statutory maximum fine could be relevant.

First, the statutory maximum fine could be relevant to show that Congress did not consider the offense to be "trivial." *Id.* at 339 n.14. That would, of course, be relevant to the first factor in the Court's analysis: the type of offense.

Second, the statutory maximum fine may be relevant to assist the Court in determining whether a defendant's Guidelines range reflects a relatively low level of culpability. Thus, the Court noted that "the maximum fine and Guidelines sentence to which [Bajakajian] was subject were but a fraction of the penalties authorized," which "show[ed] that [his] culpability relative to other potential violators of the reporting provision – tax evaders, drug kingpins, or money launderers, for example – [was] small indeed." *Id.* at 339 n.14. The context makes clear that the "maximum fine" referenced in this statement is the maximum *Guidelines* fine, and the "penalties authorized" are the maximum statutory fine and prison sentence.[1]

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[1] The Second Circuit recently noted that the words "maximum fine" here present an "ambiguity" and concluded that they refer to the maximum Guidelines fine. *See United States v. Castello*, 611 F.3d 116, 123 & n.7 (2d Cir. 2010). This is the only interpretation that makes sense. If "maximum fine" meant "maximum statutory fine," the statement would then say, nonsensically, that the maximum statutory fine is "but a fraction" of the maximum statutory fine. The only way to avoid that problem would be to interpret "penalties authorized" as including the forfeiture – but that would make no sense in this context because the size of a defendant's forfeiture does not convey any information about the culpability of "other potential violators of the reporting provision."

II. The lower court's reliance on the statutory maximum conflicts with *Bajakajian*.

Here, the lower court did not use the statutory maximum for either of the proper purposes noted in *Bajakajian*.

Instead, after it considered Mr. Cheeseman's Guidelines fine range, it compared his statutory maximum sentence to his forfeiture amount. Noting that the forfeiture was "only" double the statutory maximum, the court indicated that *for that reason* ("[t]hus") "any discrepancy between the value of the firearms and the Guideline fine is not controlling and therefore does not serve as the basis for finding an Excessive Fines Clause violation." (Pet. App. 29a-30a.) In other words, according to the lower court, where a defendant's forfeiture is not many times greater than the statutory maximum fine, this may trump a disparity between the Guidelines fine and the forfeiture.

The lower court's analysis not only lacks any basis in *Bajakajian*, it also conflicts with *Bajakajian*. As the Court explained in its footnote, the Guidelines help show an offender's individual culpability relative to other offenders. *Bajakajian*, 524 U.S. at 338-39 & n.14. To substitute the statutory maximum for the Guidelines fine as the lower court did wholly undermines this purpose. For no apparent reason, it treats a defendant as though he were the statute's worst offender, even if, like Mr. Cheeseman in this case, he is far from it.

Here, the lower court should have used the statutory maximum, if at all, to show that Mr. Cheeseman's culpability was relatively low in light of his $75,000 maximum Guidelines fine. Instead, it did

the opposite: it used this disparity as a reason to dismiss the Guidelines and treat Mr. Cheeseman as the worst offender possible under the statutory framework.

III. The lower court's approach provides much less protection of defendants' Eighth Amendment rights than *Bajakajian* intended.

The lower court's approach provides much less protection of Eighth Amendment rights than *Bajakajian* calls for because it effectively neutralizes the Guidelines as a factor in many cases. Wherever a defendant's forfeiture is less than or not many times greater than the statutory maximum, the court can, as in this case, use it to override a Sentencing Guidelines disparity.

It is true that the Guidelines are just one factor among several, but discounting the Guidelines puts a thumb on the scale on the government's side. And, as a forfeiture treatise has noted, this approach makes it all too easy for courts to "brush off excessiveness claims by comparing the amount of the forfeiture with the maximum fine authorized by the criminal statute." David B. Smith, 1-12 Prosecution and Defense of Forfeiture Cases P 12.11 (2010).

Contrary to Respondent's suggestion, Petitioner does not argue that "the maximum Guidelines fine should always be the most important or controlling factor" in determining the gravity of a Defendant's offense. (Br. in Opp. 11.) Nor does Petitioner deny that the "weight accorded to the factors var[ies] from case to case, depending on the circumstances." (Id.) Indeed, the Guidelines might warrant relatively little weight where, for example, a court varies upward from the Guidelines and imposes a steeper

fine than the Guidelines advise.[2] Petitioner only seeks to prevent courts from giving the statutory maximum, which should not even be a factor, undue weight vis-à-vis the Guidelines.

IV. The Circuits are split on this issue.

Respondent argues that the First, Second, and Ninth Circuits' position that the Guidelines should receive more weight than the maximum statutory fine, "do[es] not conflict with the decision here." (Br. in Opp. 10-11.) The discussion above reveals why this is not so.

The First, Second, and Ninth Circuits just do what *Bajakajian* did: they compare the Guidelines fine, not the statutory maximum, to a defendant's forfeiture. *See, e.g., United States v. Jose*, 499 F.3d 105, 112 (1st Cir. 2007) (comparing Guidelines maximum to forfeiture amount); *United States v. Castello*, 611 F.3d 116, 123 (2d Cir. 2010) ("[T]he relevant metric is the top of the Guidelines for the fine and for imprisonment."); *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999) ("As in *Bajakajian*, [the] potential penalties under the Sentencing Guidelines 'confirm a minimum level of culpability.'"). Taking that approach, these courts have sometimes found

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[2] Here of course, the Court did not vary upward; it varied downward and imposed *no* fine and *no* prison sentence beyond time served because of Mr. Cheeseman's extraordinary rehabilitation and "slim to [non-existent]" likelihood of recidivism. This undermines Respondent's argument that Mr. Cheeseman's Guidelines range did not "adequately account" for his conduct. (Br. in Opp. 13.) Indeed, the district court made no such finding.

forfeitures excessive even when they are less than the statutory maximum fine. (*See* Pet. 17.)

The Third, Fourth,[3] and Sixth Circuits, on the other hand, have compared a defendant's statutory maximum fine to the forfeiture amount. (*See* Pet. 14-16.) And now the Seventh Circuit has done this as well, in *United States v. Li*, 615 F.3d 752 (7th Cir. 2010). There, the defendant was fined only $10,000 for his crime of harboring an illegal alien, but suffered a forfeiture of his home worth $179,200. The court held that the forfeiture was proportional in light of the statutory maximum fine of $250,000: "Given the *potential punishment* the district court *could have* assessed, the forfeiture of Li's home is not so grossly disproportionate to the gravity of his convictions as to be excessive." *Li*, 615 F.3d at 757 (emphasis added). The Seventh Circuit made no mention of the defendant's Guidelines fine; the transcript from Li's sentencing, however, reveals that his offense level was twelve, corresponding to a fine range of just $3,000 to $30,000. Transcript of Sentencing Hearing at 10, *United States v. Li*, E.D. Wis. (2009) (No. 08-CR-212); U.S. Sentencing Guidelines Manual § 5E1.2(c)(3). By looking to the Defendant's "potential punishment" under the statute instead of his actual punishment or his Guidelines maximum, which would reflect his individual culpability, the Seventh Circuit found it easy to affirm the sentence. Had it looked to the Guidelines, as some other Circuits do, it might have

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[3] A recent Fourth Circuit case did look to the Guidelines rather than the statutory maximum, with no explanation of why it took a different approach from earlier case law. *See United States v. Jalaram*, 599 F.3d 347, 356 (4th Cir. 2010).

reached a different result. *See, e.g., United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121-22 (9th Cir. 2004) ($100,348 forfeiture excessive where Guidelines maximum was $30,000 and statutory maximum was $250,000); *United States v. Beras*, 183 F.3d 22, 28-29 (1st Cir. 1999) (on plain-error review, $138,794 forfeiture excessive where Guidelines maximum was $30,000 and statutory maximum was $250,000).

The Seventh Circuit's decision illustrates the need for clarification of the law. In some Circuits, defendants lose Excessive Fines Clause challenges based on the "potential punishment" for the worst offender under the relevant statute, and courts practically never find forfeitures excessive. (*See* Pet. at 18.) In other Circuits, defendants do not have to overcome this substantial barrier, and courts sometimes do find forfeitures excessive. (*See* Pet at 17.) Because law-enforcement agencies continue to pursue civil and criminal forfeitures in a wide range of cases, this conflict affects courts on a daily basis, and its resolution is essential to ensure equal protection of constitutional rights across all Circuits, as well as to provide clarity and certainty for law-enforcement officials as they choose where and when to deploy enforcement and prosecutorial resources.

Petitioner is not alone in noticing this conflict and its importance. One forfeiture-law treatise laments the difference in the Circuits' approaches and now cites the lower court's decision in this case as further evidence of the split. *See* Smith, *supra*, P. 12.11.

This case thus presents the Court with an opportunity to eliminate the confusion and inconsistency in the federal courts regarding the

respective roles of the Sentencing Guidelines and statutory maximum fines in an Excessive Fines Clause gross-disproportionality analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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